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By Hand Delivery
Honorable William K. Suter
Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

Re: *Douglas v. Independent Living, California Pharmacists, Santa Rosa*
Supreme Court of the United States, Case Nos. 09-958, 09-1158, 10-283

Dear Mr. Suter:

Pursuant to the Court's order of November 4, 2011, we write to address the "effect, if any, of the developments discussed in the letter submitted by the Solicitor General on October 28, 2011, on the proper disposition of this case." In that letter (the Oct. 28 SG letter), the Solicitor General advised the Court that, on October 27, 2011, the Centers for Medicare & Medicaid Services (CMS) approved many of the pending State Plan Amendments governing the provider payments at issue in the underlying petitions for certiorari.

CMS's action affects the pending cases in two ways. First, CMS's action bolsters the State's position in these cases, including with respect to some issues about which the Court posed questions during oral argument on October 3, 2011. Second, although the disputes among the parties as to some components of the underlying payment reductions are now resolved, all three consolidated petitions continue to present live controversies appropriate for resolution by this Court.

## I. BACKGROUND

Under review in the three consolidated petitions are seven separate Ninth Circuit decisions that either affirmed injunctions of, or ordered enjoined, California statutory enactments that would have reduced the State's Medicaid expenditures. Six of the seven decisions involved state statutes that reduced payments to Medicaid providers (generally by specific percentages). As to these reductions, the State submitted State Plan Amendments (SPAs) to CMS within the quarter in which the reductions were to take effect, as provided by CMS regulations. *See* 42 C.F.R. § 430.20. The seventh decision, *Dominguez*, at issue in *California Pharmacists*, No. 09-1158, involves statutory action as to which no SPA was submitted or required. Specifically, the enactment challenged in *Dominguez*, SB 6, capped the State's contribution to wages and benefits paid to providers of In-Home Supportive Services (IHSS), but did not change the methodology

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for determining rates as set forth in the applicable State Plan (i.e., collective bargaining between counties and provider unions).

On October 27, 2011, CMS announced that it had approved many of the SPAs governing the payment reductions challenged in the underlying cases (excluding *Dominguez* for which no SPA was required or submitted). The scope and effect of CMS's approvals are set forth in the table attached as Exhibit A hereto. In general, California's payment reductions were approved as follows:

- ***Pre-injunction payment reductions approved (column IV of Exhibit A).*** CMS approved all the payment reductions to the extent the State was able to implement them *before* being enjoined from doing so. Thus, for example, CMS approved California's *pre-injunction* implementation of certain 10 percent reductions under AB5, and one and five percent reductions under AB1183. *See* Ex. A, col. IV. Because California was able to implement these reductions for the approved periods, it has no basis to seek any additional payments from providers for services rendered during those periods. However, as described in more detail in Part III, *infra*, providers in *Independent Living* have filed two motions – both of which are stayed pending this Court's proceedings – that seek retroactive relief for the pre-injunction period.[1]

- ***California's request for injunction-period payment reductions partially withdrawn (column V of Exhibit A).*** Based on negotiation and consultation with CMS, California agreed to withdraw its requests for SPA approval of certain payment reductions for at least some of the periods in which those reductions were enjoined. It did so even though it believed the reduced payments complied with federal law *when approval initially was sought*, out of a concern that, to seek full retroactive relief now for the entire period of the injunctions (which were in effect 2-3 years and longer) could impose hardship on providers and ultimately affect Medicaid beneficiaries' access to care. *See* Letter from Derek E. Backus, Senior Counsel, DHCS, to Benjamin R. Cohen, Presiding Officer, CMS (Oct. 27, 2011) (attached to the Oct. 28, 2011 SG letter). The periods during which California's payment reductions were enjoined, for which California agreed to withdraw its requests for approval, are set forth in column V of Exhibit A. For these periods of time, California has no basis to seek recoupment from providers for payments made under the injunctions, and providers have no basis to demand any further reimbursement.

- ***Injunction-period payment reductions approved to the extent not withdrawn by California (column VI of Exhibit A).*** California did not withdraw its requests for SPA approval for certain periods during which its rate reductions were enjoined. With respect to these periods, its requests were approved, as reflected in column VI of Exhibit A. Thus, if the Court rules in

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[1] The Ninth Circuit held that the State waived its Eleventh Amendment immunity when it removed the case at issue in *Independent Living*, No. 09-958. *Indep. Living* Pet. App. 29-37. The cases at issue in the *California Pharmacists*, 09-1158, and *Santa Rosa*, 10-283, were initially filed in federal court and therefore do not present any waiver issue.

California's favor in the present cases, and the underlying injunctions are vacated as a result, California will have a right to seek reimbursement from providers for excess payments that it was compelled to make to them in order to comply with the lower court's injunctions.

## II. SPA APPROVAL BOLSTERS CALIFORNIA'S POSITION IN THESE CASES

CMS's approval of California's SPAs bolsters two aspects of the State's position that were the subject of questions from the Court at oral argument on October 3, 2011.

***A State may implement a rate reduction while awaiting SPA approval.*** At oral argument, several questions from the Court suggested that the Medicaid Act bars a State from implementing a rate reduction until it obtains CMS approval of a SPA, and that a State should be enjoined from implementing a rate reduction while awaiting SPA approval. *See* Tr. of Proceedings at 6:16-23 (Kagan, J.); *see also id.* at 41:9-16 (Sotomayor, J.); *id.* at 50:16-24 (Kagan, J.). As we explained at oral argument, and also in prior briefing in the Court, no statute or regulation requires a State to obtain SPA approval before implementing a rate reduction. *See* Tr. of Proceedings at 6-7; Pet'rs' Supplemental Br., *Cal. Pharm.*, No. 09-1158 (filed Dec. 20, 2010).[2] To the contrary, the only regulation governing the issue merely requires that the State submit its SPA within the quarter in which the SPA is to take effect. 42 C.F.R.§ 430.20.

CMS's decision to approve payment reductions *retroactively* to the quarter in which the SPAs were submitted (in some cases, more than three years ago) confirms that California's understanding of the SPA approval requirements is correct and is consistent with the views of the federal government. If the Medicaid Act barred a state from implementing a rate reduction until CMS approval is obtained, CMS could not – and would not – have approved any payment reductions retroactively.

***Permitting parallel private enforcement litigation undermines congressional intent regarding centralized administrative enforcement of Medicaid and prejudices the State's position in CMS administrative proceedings.*** We have previously advised the Court how injunctions in private lawsuits interfere with the administrative enforcement scheme intended by Congress and, specifically, may materially prejudice the State in terms of its ability to obtain SPA approval. *See, e.g.*, Brief for Petitioners 28-29, *Douglas v. Indep. Living Ctrs., Cal. Pharm., Santa Rosa*, Nos. 09-958, 09-1158, 10-283 (filed May 19, 2011); *see also* Pet'r's Supplemental Br. 5-6, *Douglas v. Indep. Living Ctr.*, No. 09-958 (filed Dec. 14, 2010). Further, such lawsuits draw out the process: in the vast majority of cases, SPAs are approved or otherwise consensually resolved within 90 days from when they are submitted, and the present cases are the exception that proves the rule. *See* Tr. of Proceedings at 11:11-16; *id.* at 12-13.

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[2] And certainly no statute or regulation confers a "right" on private parties to judicially enforce such a requirement, even if such a requirement could be found to exist.

The SG's letter and its attachments confirm the prejudicial effect of court injunctions. California felt compelled to partially withdraw its requests for SPA approval out of a concern, shared by CMS, that seeking full retroactive approval and implementation of the payment reductions could ultimately affect beneficiaries' access to services. *See* Letter from Derek E. Backus, Senior Counsel, DHCS, to Benjamin R. Cohen, Presiding Officer, CMS (Oct. 27, 2011) (attached to the Oct. 28, 2011 SG letter) ("DHCS has a genuine concern, which CMS shares, that recoupment for such a lengthy period of time could create a real access problem for Medi-Cal beneficiaries who rely on those providers subject to a multi-year recoupment."). DHCS took this action notwithstanding that it "continues to believe that, at the time the SPAs were submitted, the rates satisfied [§ 30(A)], a conclusion with which we understand CMS does not disagree." *Id.*

## III. A LIVE CONTROVERSY REMAINS BEFORE THIS COURT FOR DECISION

The fact that CMS has approved the underlying SPAs, and therefore the challenged payment reductions, does not affect the "live" nature of the controversy before this Court.

### A. Under Respondents' Theory, SPA Approval Does Not Impact the Existence of a Supremacy Clause Cause of Action Against the State

Respondents have consistently taken the position, in oral argument and through their post-approval actions, that SPA approval has no impact whatsoever on the existence of a Supremacy Clause cause of action against a state whose Medicaid reimbursement rates purportedly conflict with § 30(A). At oral argument, counsel for respondents explained that, under respondents' theory, a Supremacy Clause cause of action would exist even were the SPAs approved by CMS:

JUSTICE ALITO: What about the agency approves rates and someone is dissatisfied with the rates sues and says these rates are ridiculously low?

MR. PHILLIPS: Oh, you can bring a lawsuit --

JUSTICE ALITO: They still can sue –

MR. PHILLIPS: -- Justice Alito. The -- the bottom line is you're going to lose that -- that litigation and in a circumstance where you have no realistic prospect of --

JUSTICE ALITO: Well, how do you know they're going to lose the litigation? Why should they lose the litigation if it's really -- if there really is a cause of action there? Some of the Medicaid rates are very low, aren't they?

MR. PHILLIPS: Well, ultimately, you they have to demonstrate that there's -- that there is a -- by clear and convincing evidence, a conflict between Federal and the State law. And the agency that has –that evaluates the standards of Federal law will have said in a very authoritative way that there is not a violation under those circumstances.

CHIEF JUSTICE ROBERTS: But you still have a cause of action under the Supremacy Clause.

MR. PHILLIPS: Oh, no, to be sure, I have a cause of action

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JUSTICE SCALIA: You've lost me here. You -- you say there would be a cause of action under the Supremacy Clause if the agency approves the rates, but your clients don't think the rates are high enough?

MR. PHILLIPS: Sure, we would still say there's a --

JUSTICE SCALIA: Under the --

MR. PHILLIPS: We would still have an argument that there's a conflict between Federal and State law.

JUSTICE SCALIA: Well, Federal law is determined by the agency, surely. So long as the agency is complying with the Administrative Procedure Act, I don't see how you have any --

MR. PHILLIPS: Well --

JUSTICE SCALIA: -- any cause of action under the Supremacy Clause; you may have an APA cause of action.

MR. PHILLIPS: Well, we -- well, the problem with the APA -- we might have an APA cause of action, but I also think that there is a -- I mean, I -- look, that hypothetical is so far afield

JUSTICE SCALIA: Federal law is not determined by the agency?

MR. PHILLIPS: I'm sorry, Justice Scalia.

JUSTICE SCALIA: Federal law is not determined by . . . the agency?

MR. PHILLIPS: No, of course, Federal law is determined by the agency --

JUSTICE SCALIA: Well, then you don't have a Supremacy Clause cause of action.

MR. PHILLIPS: Well, I think you -- I still think you can bring an action under the Supremacy Clause. I think, ultimately, you have very -- you have zero hope of prevailing --

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CHIEF JUSTICE ROBERTS: Why does the agency get to determine Federal law when Congress doesn't? You told me earlier if Congress –

MR. PHILLIPS: Because Congress --

CHIEF JUSTICE ROBERTS: -- Congress says in a statute no implied right of action, that that doesn't control.

MR. PHILLIPS: Right, but that doesn't -- that controls to the extent of trying to enforce directly the Federal statute; it doesn't control with respect to trying to enforce the Supremacy Clause.

Tr. of Proceedings at 52-56.

Respondents' recent actions have confirmed the view they advanced at oral argument. In the days following CMS's announcement, counsel for several of respondents here (Hooper, Lundy & Bookman, and Lynn S. Carman) filed two new lawsuits challenging some of the SPA approvals as to rate reductions not at issue in the present cases. Exs. B, C. Plaintiffs in those cases – who include many of respondents here[3] – assert both Supremacy Clause/§ 30(A) causes of action (against DHCS) and federal APA claims (against the Secretary of the United States Department of Health and Human Services (HHS)). Ex. B, at 34-37, 39-42; Ex. C, at 10-11. These lawsuits seek to proceed on the theory enunciated by their counsel at oral argument: that a Supremacy Clause cause of action exists whenever there is a conflict between federal and state law (plus standing to assert injury), and that SPA approval is irrelevant to its existence.[4] (Mr. Phillips' co-counsel apparently do not agree with him that a challenge to CMS's approval of a SPA has "zero hope of prevailing.")

Respondents' position at oral argument – that *if* a preemption cause of action may be stated here against the State, SPA approval may affect its merits but not its existence – appears to

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[3] Respondents who are also plaintiffs in the new cases include: the California Hospital Association; Independent Living Center of Southern California, Inc.; Gerald Shapiro, Pharm.D; Sharon Steen; Tran Pharmacy, Inc.; and Mark Beckwith.

[4] By contrast, petitioners contend that (1) *no* private cause of action exists as to § 30(A), a statute that does not confer any rights and that contains vague and undefined standards that are suited to administrative enforcement; (2) equitable relief is only available to redress breach of a "right," not merely an "injury," *see* 1 John Norton Pomeroy, *A Treatise on Equity Jurisprudence*, §§ 89-107 (3d ed. 1905) (enumerating the full panoply of "primary rights," the breach of which may give rise to an equitable "remedial right"); *see also Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137 (1939); *Terrace v. Thompson*, 263 U.S. 197, 214 (1923); and (3) exercise of the Court's equitable powers is limited by its separation-of-powers jurisprudence, *see, e.g., Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001).

be correct. To be sure, a federal agency's interpretation of federal law that it administers is entitled to judicial deference, and may even be dispositive when its interpretations are challenged in court. *National Cable & Telecomm. Ass'n v. Brand X Internet Svcs.*, 545 U.S. 967 (2005) (*Brand X*); *Chevron, USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). However, deference to a federal agency's interpretation of federal law goes to the merits of a cause of action, not its existence.

**B. A Live Controversy Continues to Exist Between DHCS and Respondents**

Nor is the case moot under the State's position. SPA approval, and DHCS's agreement to withdraw some requests for approval, have resolved some components of the parties' dispute. However, a live controversy continues to exist in all three petitions.

As explained in Part I, *supra*, and in the table attached as Exhibit A, there is no longer any dispute regarding some periods during which the payment reductions either were allowed to take effect (pre-injunction), or were not in effect because they were enjoined. This is largely because, in consultation with CMS, DHCS agreed to withdraw certain requests for retroactive SPA approval out of a concern for ensuring adequate beneficiary access to services.

DHCS did not, however, agree to withdraw all of its requests for SPA approval for periods in which rate reductions were enjoined. There remains a live controversy as to those rate reductions that were enjoined by a court, that CMS subsequently has concluded comply with federal law, including § 30(A), and as to which the State did not withdraw its request for SPA approval. Should this Court rule in DHCS's favor in the underlying petitions, those injunctions would be vacated. DHCS would then be in a position to seek recoupment of amounts paid to providers as a result of the injunctions, to the extent those payments exceeded the rates that CMS has now approved. *See* Cal. Welf. & Inst. Code §§ 14176, 14177; 22 Cal. Code. Regs. § 51458.1.

Specifically, the potential for such recoupment, based on SPA approval, exists as to most of the reductions at issue in the *California Pharmacists* and *Santa Rosa* petitions. *See* Ex. A, col. VI. This includes: (1) the AB1183 reduction applicable to hospital outpatient services over the period January 1, 2011 through April 12, 2011; (2) the AB1183 reduction applicable to distinct part skilled nursing facilities over the period March 1, 2011 through May 31, 2011; (3) the AB1183 reductions applicable to Adult Day Health Centers over the period March 1, 2011 through May 31, 2011; (4) the AB1183 reductions applicable to prescription drugs over the period March 1, 2011 through May 31, 2011; (5) the AB1183 reductions applicable to noncontract hospitals over the period January 1, 2011 through April 12, 2011; and (6) the AB5 reductions applicable to noncontract hospitals over the period January 1, 2011 through April 12, 2011.

Although the potential for recoupment by California of excess payments no longer exists as to the reductions at issue in the *Independent Living* petition, that petition continues to present a live controversy for a different reason. Specifically, unless this Court rules in its favor,

California anticipates that some providers in *Independent Living* will continue to press for additional, pre-injunction, retroactive reimbursement based on already pending motions for summary judgment that seek precisely that relief. The Ninth Circuit has already ordered retroactive reimbursement to *some* providers for *some* services, specifically those encompassed within the district court's order of August 18, 2008 in *Independent Living*, such as physicians, clinics, dentists, optometrists, adult day health care centers, and prescription drugs. *Indep. Living* Pet. App. 29-37. Following the Ninth Circuit's decision, respondents filed two separate motions for summary judgment that sought permanent injunctions of the AB5 reductions retroactive to July 1, 2008, and that included *other* providers and services for which retroactive relief previously had not been sought. C.D. Cal. No. 08-CV-03315, Docket Entry No. 376, at 2:5-12; C.D. Cal. No. 08-CV-03315, Docket Entry No. 370.[5] The district court has stayed these motions pending a decision from this Court. C.D. Cal. No. 08-CV-03315, Docket Entry No. 392.

The dispositions of the two stayed motions in *Independent Living* will depend on how this Court rules. If the Court adopts respondents' theory, they will be able to continue to prosecute their motions in an effort to obtain additional retroactive relief (notwithstanding, as noted above, the intervening SPA approvals). If, however, the Court rejects respondents' theory, the cases will be dismissed entirely, and the pending motions will never be decided.[6]

Some respondents may contend that the proper course is to remand the cases to the Ninth Circuit to reassess whether, in light of the SPA approvals, the injunctions should be vacated on their merits. And it is true that, under this Court's precedents, the Ninth Circuit would be required to exercise great deference both to CMS's interpretation of § 30(A) and its application

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[5] Those additional services include non-emergency medical transportation and home health agency services (at issue in the *Independent Living* petition), as well as hospital outpatient services (SPA approved for services rendered July 1, 2008-February 28, 2009); DP/NF (level B) services (SPA approved for services rendered July 1, 2008-February 28, 2009); DP/NF (subacute) services (SPA approved for services rendered July 1, 2008-February 28, 2009); durable medical equipment (SPA approved for services rendered July 1, 2008-February 28, 2009); and certain non-contract hospital inpatient services (SPA approved for services rendered July 1, 2008-April 12, 2011, except for 17 plaintiff hospitals in *Santa Rosa*, as to which it was approved for services rendered July 1, 2008-November 17, 2009, and January 1, 2011-April 12, 2011).

[6] Were the Court to determine, notwithstanding this discussion, that *Independent Living* is moot, then it could either hold *Independent Living* pending resolution of the other two petitions, or remand to the Ninth Circuit with directions to vacate its judgments and the underlying injunctions as moot, and to order the cases dismissed. Holding *Independent Living* pending a disposition in *California Pharmacists* and *Santa Rosa* would enable the Court to assess whether any dismissal should be with prejudice.

of the relevant statutory standards to the challenged reductions. *Brand X*, 545 U.S. 967; *Chevron*, 467 U.S. 837; *see also Chase Bank USA v. McCoy*, 131 S. Ct. 871 (2011). However, remand would preclude a judicial determination of the threshold question of whether a private cause of action even exists; if no cause of action exists, there would be no basis for the Ninth Circuit to use the pending cases as a vehicle to, in effect, collaterally review CMS's decision to approve the SPAs (as distinct from the proper vehicle, a lawsuit brought under, and governed by, the federal APA). Moreover, the Ninth Circuit has *in these cases* already expressly (and incorrectly) rejected CMS's interpretation of § 30(A), and expressly (and incorrectly) ruled that CMS's construction is not entitled to judicial deference. *Indep. Living* Pet. App. at 17. And finally, unless the Court decides the threshold "cause of action" question, the problems with permitting private enforcement of § 30(A) would persist: as long as private parties may invoke preemption theory to enforce § 30(A), the States will continue to be subject to the conflicting interpretations of federal law and the massive, but unpredictable, liability that Congress sought to avoid by centralizing enforcement in HHS. *See Astra USA, Inc. v. Santa Clara Cty.*, 131 S. Ct. 1342, 1349 (2011).[7]

Finally, the *California Pharmacists* petition continues to present a "live" controversy for another reason: the state statute challenged in *Dominguez* is unaffected by SPA approval. We note that, after the district court entered its injunction in *Dominguez*, the California Legislature acted to suspend the challenged state statute until, at the earliest, July 1, 2012, and then, only "if a court of competent jurisdiction has issued an order, that is not subject to appeal or for which the time to appeal has expired, upholding its validity," "in order to allow the litigation to reach a final result." Cal. Welf. & Inst. Code § 12306.1(d)(7)(A),(B).[8] A decision by this Court that § 30(A) is not privately enforceable would therefore eliminate one significant hurdle to obtaining the final judicial determination that this statute requires. (The district court would still have to rule on plaintiffs' other claims, including those brought under the Americans with Disabilities Act and the Rehabilitation Act.)

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[7] In a recently filed brief in one of their new lawsuits, respondents seek to enjoin some of the CMS-approved reductions expressly on the ground that the Ninth Circuit's interpretation of § 30(A) is correct; CMS's interpretation is incorrect; and the Ninth Circuit is not required to defer to CMS. *See* Ex. D, at 5-6; *see also* Ex. B, at 40:1-12 (arguing that HHS is bound by the Ninth Circuit's interpretation of § 30(A)); Ex. C at 11:16-21.

[8] *See also id.*, § 12306.1(d)(7)(A) ("The Legislature finds and declares that injunctions issued by the courts have prevented the state from implementing the changes . . . during the pendency of litigation. To avoid confusion for providers, recipients, and other stakeholders, it is therefore the intent of the Legislature to temporarily suspend the reductions . . . until July 1, 2012, to allow the litigation to reach a final result.").

For all the foregoing reasons, in addition to those mentioned in our briefs, petitioners request that the Court (1) hold that private parties may not bring a preemption claim to enforce § 1396a(a)(30)(A); (2) reverse or vacate the Ninth Circuit's judgments; and (3) direct the Ninth Circuit to vacate any injunctions and order the cases dismissed with prejudice.

Respectfully,

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